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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A.D. 1967

NO. 1275

WALTER BUTTERMAN and EMMY BUTTERMAN,

Petitioners,

V.

WALSTON & CO., INC., a New York Corporation, d/b in Chicago, Illinois, W. D. FLEMING, Vice President, Chicago Branch of Walston & Co., Inc., ALFRED J. RAUSCHMAN, Vice President, New York, Walston & Co., Inc., BLANCHE BLAHUT, individually and as agent of Walston & Co., Inc., Chicago Branch, JAMES E. SULLIVAN, Office Manager, Chicago Branch, individually and as agent of Walston & Co., Inc., a New York Corporation,

Respondents.

PETITION FOR REHEARING

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There is no precedent for the Court of Appeals' opinion. It is at odds with every Federal and State Court expression on the subject. There is no rationale given to support such a drastic departure from such a universally accepted concept as an individual's right to discharge or substitute counsel, at any time, with or without cause.

This Court's failure to hear this cause does preclude further review of an apparent denial of due process by a Federal Court and perpetuates judicial recognition of a summary denial of a litigant's basic right to a fair hearing. The opinion of the Appeals Court, on its face, reduced the right of all litigants to a hearing with counsel of their choice to the discretion of a trial court. This opinion is now the "last word" on the subject of an individual's right to counsel of choice. Its far-reaching and broad pronouncements can now be read as authority for two novel and alien proposisions of law:

1) THE RIGHT TO COUNSEL OF CHOICE IS NOT ABSOLUTE --

> "The rule that a party has a right to counsel of his choice and to change or substitute for his attorney of record is not absolute. . ."
> (Court of Appeals Opinion)

With no citation of authority, or no re-examination of the basic rationale underlying the following precedents, the Seventh Circuit Court of Appeals abandoned the concept that counsel of choice is the unqualified right of the individual. (McDonnell v. Tabah, 297 F. 2d 731, 733 (2nd Cir. 1962); Doggett v. Deauville Corp., 148 F. 2d 881, 882-883 (5th Cir. 1945); Lovvorn v. Johnston, 118 F. 2d 704, 705 (9th Cir. 1941); Savich v. Savich, 12 Ill. 2d 454, 455, 456, 457, 458 (1957); 7 Am. Jr. 2d, Attorneys at Law, Sec., 138, 148, pp. 132, 135).

2) THAT DENIAL OF THE RIGHT TO COUNSEL OF CHOICE IS DISCRETIONARY WITH THE TRIAL COURT --

> "We think under the circumstances of this case there was no abuse of discretion in the court's ruling." (Court of Appeals Opinion)

This concept is of course not buttressed by either precedent or rationale. It is a blanket assertion that basic and fundamental rights may be denied in the discretion of a trial judge.

These "rules of law" are uniquely alien to our system of ordered liberties and such an ill-founded authority should not be allowed to summarily lay to rest the basic, unqualified and absolute right of an individual to confide in and be represented by an attorney of his choice.

The opinion of the Seventh Circuit Court of Appeals did not mention the long list of authorities it abandoned in this decision. The one case in point referred to was miscited, misspelled and misread. In summarily dismissing a case directly in point on the facts and issued involved, the Appeals Court simply stated:

> " 'And we do not read Sovich v. Sovich, 12 Ill. 2d 459, as militating against our conclusion that the ruling before us does not violate due process.' " (Court of Appeals Opinion)

The miscited case was Savich v. Savich, 12 Ill. 2d 454 (1957), and after reciting facts remarkably similar to the case at bar, the Illinois Supreme Court clearly and expressly held:

"From the record it appears that when the cause was called for trial, the attorney appearing for plaintiff asked to withdraw on the ground that plaintiff had discharged him, and no longer wanted him to represent her. The court denied the motion and directed the attorney to proceed with his direct examination, stating that the cause had been continued twice before and that plaintiff had not appeared on either occasion. When counsel asked plaintiff the preliminary questions of name and address, she turned to the court and explained that she spoke English poorly, and asked if the man questioning her was her lawyer. When told that he was, plaintiff refused to answer his questions, stating that she did not trust him, and that he had never talked to her about the case. She repeatedly asked for Mr. Kelly, the attorney she had requested to represent her, who was also present in the courtroom. Notwithstanding the assurances by the court that she would get a fair trial, plaintiff refused to answer counsel's questions until directed to do so by the court. The court told her original counsel that if plaintiff would not answer him, the court would question her. When asked by the court if she had any witnesses, plaintiff replied that she had, but had not been told to bring them.

* * *

"In determining first whether the court erred in denying the motion to withdraw by plaintiff's attorney, after his client had dismissed him, we recognize the established right of a party to discharge his attorney at any time with or without cause, and to substitute other counsel, for a client is entitled to be represented by an attorney in whose ability and fidelity he has confidence. Stone v. Baldwin, 331 Ill. App. 421, 425; Regan v. Chicago, Milwaukee and St. Paul Railroad Co. 204 Ill. App. 115; Conlan v. Sullivan, 280 Ill. App. 332; Pressney v. Pressney, 339 Ill. App. 371; People v. Franklin, 415 Ill. 514; 7 C.J.S. 941.

"In the Pressney case the court stated at page 374: 'Upon termination of the relation of attorney and client the latter has the right to substitute another for the

person discharged, and the court cannot rightly continue a discharged lawyer as attorney or solicitor of record against the will of the client.' "
(12 Ill. 2d 454, 455, 456, 457, 458)

The court of appeals may well have concluded its comment on Savich with its first five introductory words, "And we do not read. . ." Presumably other litigants and courts may not read beyond the narrow holding of this opinion.

The denial of this petition clearly says to these litigants and those in similar circumstances, "And we do not hear. . ." Justice need not be both blind and deaf -- to the meaning of this opinion and its effect in this case and cases in the future.

This court has often pointed out that a denial of a petition for writ of certiorari does not affirm the decision of the lower court on the merits. However, the effect of a failure to hear this cause gives tacit affirmation to the summary disposition of meritorious cause of action by our federal court system. The denial of this petition in effect gives further protection to the already substantial legal insulation provided securities dealers from civil liability. Although not an accurate account of the issues raised in this cause on appeal, the following is illustrative of the financial world's opinion as to the meaning of this court's denial of plaintiffs' petition for writ of certiorari in this case.

"In other cases, the High Court:
---Left standing a lower court's dis-

missal of a damage suit against Walston & Co., a New York Stock Exchange member firm, for alleged excessive and unauthorized trading an investor's account.

* * *

"The Walston & Co. case that the High Court declined to review involved a suit brought against the securities concern and its Chicago office personnel by Mr. and Mrs. Walter Butterman. The Buttermans charged a registered representative of Walston with 'excessive and unauthorized churning' of their account. The alleged churning caused Walston to charge commissions of more than $4,000 and resulted in losses to the account of about $8,000, the suit maintained.

"The suit alleged violations of the Securities Exchange Act and accused Walston of failure to properly supervise its employees. A Federal district court ruled against the Buttermans and an appeals court affirmed the district court." (The Wall Street Journal, Tuesday, May 21, 1968)

THEREFORE, for the reasons herein we respectfully pray that this Petition for Writ of Certiorari be granted a rehearing.

Respectfully submitted,

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CERTIORARI DENIED